Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-777

ALICE MILLER,

Petitioner,

vs.

PATRICIA ROBERTS HARRIS, Secretary, Department of Housing & Urban Development; WALTER A. SIMON, in his official capacity as HUD in Possession Housing Authority of the City of Los Angeles; ROBERT F. JOHNSON, Officer, Dept. of Housing & Urban Development; HOUSING AUTHORITY OF THE CITY OF LOS ANGELES, Dept. of Housing & Urban Development,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

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Introductory Paragraph.

Alice Miller, your Petitioner, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on February 24, 1977, following denial of your Petitioner's timely Petition for Rehearing therein on September 2, 1977.

Opinions Below.

None of the opinions concerning this matter has been published. The following opinions are relevant and are reproduced in the Appendix as indicated: Mem-

orandum of the United States Court of Appeals for the Ninth Circuit entered February 24, 1977 (Appendix I); Order of the United States Court of Appeals for the Ninth Circuit, entered September 2, 1977 (Appendix II); and Memorandum of the United States Court of Appeals for the Ninth Circuit entered March 17, 1975 (Appendix III). The District Court did not render a written opinion. Its Findings of Fact and Conclusions of Law are appended as Appendix IV.

Jurisdiction.

The Judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 24, 1977. A timely Petition for Rehearing was denied on September 2, 1977. The jurisdiction of the Supreme Court is invoked under the provisions of 28 U.S. Code, Sections 1254(1); 1651 and 2106 and Rule 19(b) of the Revised Rules of the United States Supreme Court.

Questions Presented.

Precisely, the issue is: Whether lower courts should adjudicate disputed facts presented in affidavits on a motion for Summary Judgment pursuant to Rule 56 and, in doing so, whether such courts have acted in direct conflict with prior decisions of this Court, departed from accepted and usual judicial proceeding and have sanctioned such a departure calling for an exercise of this Court's power of supervision by reaffirming the rule on summary judgment to be simply whether or not a genuine issue of fact is raised by the affidavits.

Statutes Involved.

The following statutory provisions are set forth in the Appendix: California Code of Civil Procedure, Section 338(1) (Appendix V) and Rule 56, Federal Rules of Civil Procedure (Appendix VI).

Statement.

On January 20, 1971, Petitioner commenced proceedings by the filing of a Complaint in the United States District Court for the District of Columbia, alleging, in effect, that she had been injured by reason of the Respondents'[1] denial of her right to appeal her discharge from employment, in 1965, with the Housing Authority of the City of Los Angeles ("HACLA"), and that her dismissal was in violation of her civil rights. (Subsequently, the Court of Appeals for the Ninth Circuit held that Petitioner's claims were "cognizable under 42 U.S.C. Section 1983 and 28 U.S.C. Section 1343(3); her fourth claim is cognizable under 42 U.S.C. Section 1985(3) and 28 U.S.C. Section 1343(1)." Appendix III, p. 6. The Court of Appeal also held that other claims appeared to have been stated in Petitioner's Complaint. *Id.*)

No responsive pleadings have ever been filed by any of the respondents.

In December 1971 the proceedings were transferred, on the Court's own motion, to the United States District Court for the Central District of California.

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[1]Patricia Roberts Harris, the present Secretary, Department of Housing & Urban Development, was substituted as a party-appellee by the Court of Appeal for George W. Romney, the original Defendant/Appellee, pursuant to the provisions of Rule 43(c), Federal Rules of Appellate Procedure. Appendix I, note 1.

Thereafter, on April 12, 1973, the District Court granted a motion of the Respondents to dismiss for failure to state a claim, and for summary judgment. This judgment was reversed on March 17, 1975. (Appendix III.) In reversing, the Court of Appeals also noted: "The 'affidavits' filed in support of the summary judgment motion manifestly violated Rule 56(e), Federal Rules of Civil Procedure." (Appendix III, p. 7).

Immediately upon remand to the District Court, and without the filing of any affidavits, the Federal Respondents again moved for summary judgment in the District Court, claiming that Petitioner's claims were barred by the Statute of Limitations (California Code of Civil Procedure, Section 338(1). Petitioner replied with affidavits claiming *inter alia* that the Respondents were estopped from asserting the Statute of Limitations by reason of their conduct, and her reliance upon the conduct of federal officials.

On July 11, 1975, the District Court again signed Findings of Fact and Conclusions of Law and a Judgment granting the Respondents' Motion for Summary Judgment (Appendix IV).

The Judgment was affirmed on February 24, 1977 (Appendix I) and a Petition for Rehearing was denied on September 2, 1977 (Appendix II).

REASONS FOR GRANTING THE WRIT.

After many years of struggling in the federal courts, Petitioner has been ejected as a litigant by the lower courts' rejection of not only a long standing principle of law, but one which is universally acknowledged in the United States.

The only affidavits filed below, in conformance with the requirements of Rule 56, Federal Rules of Civil Procedure, were those of the Petitioner, and they were in opposition to the motion. (Although two "affidavits" had previously been filed in connection with an earlier motion by the Respondents, the Court of Appeals had already determined that they were not affidavits at all. Appendix III, p. 7). Petitioner's affidavits allege facts which, if found to be true, would overcome the defense of the statute of limitations. (Petitioner had filed three affidavits, all of which were relied upon in her opposition to the Motion for Summary Judgment. These affidavits are found at the following pages of the Clerk's Transcript on Appeal: 269 *et seq.*, 707 *et seq.*, and 865 *et seq.*)

The Motion for Summary Judgment and the Responses thereto are contained in nearly 150 pages of the Clerk's Transcript on Appeal [C.T. 787-934]. (The Motion is at pages 787 through 864; Petitioner's Affidavit and Points and Authorities in Opposition are at pages 865 through 934).

In ruling favorably upon Respondents' motion, the District Court specifically struck from the prepared Findings of Fact and Conclusions of Law the following language:

> "There is no genuine issue as to any material fact and the defendants Romney, Simon and John-

son are entitled to have summary judgment entered in their favor." [C.T. 937, lines 26-28]. (Appendix IV, p. 10.)

In affirming, the Court of Appeals first rejected Petitioner's argument that the Statute of Limitations could not commence until she had been afforded her administrative remedies with the statement: "The illogical import of this argument is that if we should hold her claim not to have ripened because of failure to exhaust administrative remedies, we would be forced to dismiss her action." (Appendix I). This was not illogical, rather it was one of the reliefs specifically being sought, *i.e.*, to compel the Government to provide her with an opportunity to exhaust her administrative remedies.

The Court of Appeals then rejected Petitioner's assertions regarding the Government's estoppel and waiver of the right to assert the Statute of Limitations by stating:

> "The short answer to this argument is that the record abundantly indicates that Miller never relied upon the statements claimed to have been made by government representatives. Rather, she continually pressed for an informal answer to her grievance." (Appendix I, p. 2.)

We do not argue with the proposition that the record supports the conclusions drawn by both the Courts below. We do, however, dispute the manner in which the conclusions were drawn, being by Summary Judgment and in the face of conflicting evidence, which, likewise, would have supported a contrary conclusion.

Petitioner urged that she had been misled by federal representatives and that she relied upon misrepresentations made to her by federal representatives in pursuing incorrect remedies to attempt to rectify the wrong which she felt had been inflicted upon her.

A significant portion of the Petitioner's Affidavit in opposition to the Government's Motion for Summary Judgment consists of copies of correspondence from federal agencies which, in effect, tell Petitioner that she is not entitled to relief from the federal government and that she should seek her remedies elsewhere.

By way of example, only, and not by any means by way of limitation, we examine a letter dated December 28, 1965, addressed to Petitioner's then counsel [C.T. 875] which states, at the end thereof:

> "Until such time as it can be shown that the Federal Government's interest is involved, purely administrative matters are left to the jurisdiction of the Housing Authority."

Petitioner's Affidavit states, with respect to such correspondence:

> "2. Since the date of my discharge on June 8, 1965, I have diligently pursued my rights with all the financial, intellectual and physical abilities that I possess. See Plaintiff's Exhibit 'A' attached hereto and incorporated herein;
>
> "3. My efforts to determine that the Federal Government was the appropriate authority to grant the relief that I sought was met by persistent denials of said government's agencies' ability to grant said relief;
>
> "4. My reliance on the representations made to me by Federal Government agencies delayed my filing of the herein case." [C.T. 865, lines 22-30].

Exhibit "A" to Petitioner's Affidavit consists of numerous letters between Petitioner and various federal officers relating to her efforts to discover her proper remedies, and the Government's replies.

Pages 1 and 2 of Petitioner's Affidavit [C.T. 865 and 866] set forth how she discovered, for the first time, in November 1970, that she was entitled to federal relief, and that the federal officers had been misrepresenting the truth to her. (This was well within the applicable period for the filing of her Complaint, which was filed on January 20, 1971.)

The Respondents' position appears to be that which was adopted by both the District Court and the Court of Appeals, to wit: Since the Complaint shows, upon its face, that Petitioner is barred by the California Statute of Limitations, the Motion for Summary Judgment shall be granted.

Unfortunately, the conclusions reached by both of these lower courts failed, completely, to consider the conflicting evidence upon Estoppel and Waiver, either of which would bar or delay the application of the Statute of Limitations, and the case law upon the subject.

It has long been the rule, even in the Ninth Circuit, that unless but one inference can be drawn from the evidence, estoppel is a question for the trier of fact, and is not properly disposed of in Summary Judgment. *Caplan v. Roberts* (9th Cir. 1974) 506 F.2d 1039, 1042.

Many jurisdiction have acknowledged that the issue of the Statute of Limitations is ordinarily one of fact and not one to be easily resolved on Summary Judgment: *Sheets v. Burman* (C.A. Miss. 1963) 322 F.2d

277; *Falk v. Levine* (D.C. Mass. 1946) 66 F.Supp. 700; *Delson v. Minogue* (D.C.N.Y. 1961) 190 F.Supp. 935; *Chartener v. Kice* (D.C.N.Y. 1967) 270 F.Supp. 432.

California's Statutes of Limitations (Code of Civil Procedure, Sections 335 *et seq.*) are subject to the doctrine of estoppel. *Lerner v. L.A. City School Board* (1963) 59 Cal.2d 382, 397, 380 P.2d 97; *Berkey v. Halm* (1950) 101 Cal.App.2d 62, 224 P.2d 885; *Schaefer v. Kerber* (1951) 105 Cal.App.2d 645, 234 P.2d 109.

The doctrine of estoppel may also be applied against the Federal Government acting in its sovereign capacity. *United States v. Wharton* (9th Cir. 1975) 514 F.2d 406, 410-411.

The facts before the respective lower courts presented the issue of whether or not the Statute of Limitations barred Petitioner's claims. The lower courts decided that it did, but in doing so had to reject her Affidavit which set forth sufficient grounds for application of the doctrines of Estoppel and Waiver. Neither court chose to discuss her affidavit, and the lower Court totally skirted the matter by striking from its findings the clause that there were no genuine issues of fact.

We submit that by striking the most significant requirement in a summary judgment, "lack of a genuine issue of fact", the District Court's judgment "is opaque and unilluminating as to either the relevant facts or the law with respect to the merits of appellants' claim. In this posture of the case, we are unconvinced that summary judgment was properly entered." *Carter v. Stanton* (1972) 405 U.S. 669, 671, 92 S.Ct. 1232, 31 L.Ed.2d 569, 572.

Conclusion.

Petitioner is seeking no more than that to which every federal litigant is entitled, a fair and even-handed application of judicial procedure. She is not asking this Honorable Court to decree any new rules, nor to carve out an exception for her case. All she asks is that her case receive the same legal applications as any other.

There is nothing mysterious about Summary Judgment; the rules are well known. Occasionally, however, the rules tend to be overlooked in the name of expediency.

Just because Petitioner is not a large corporation or is not bearing a case in which monumental constitutional issues have been framed, or upon which significant social issues may be resolved, we believe is no reason to deprive her of the right to the same rules as any other litigant. The well established procedures embodied in Rule 56 should, therefore, be applied equally and uniformly to Petitioner as they would to any other federal litigant.

We respectfully submit that this is a proper case for the granting of a Petition for Certiorari and for the reasons set forth above, respectfully pray for the consideration of this Court.

L. LAWRENCE BRAUN and
LAWRENCE H. EISENBERG,
By LAWRENCE H. EISENBERG,
Attorneys for Petitioner.

APPENDIX I.

Memorandum.

United States Court of Appeals, for the Ninth Circuit.

Alice Miller, Appellant, vs. Patricia Roberts Harris,* Secretary, Department of Housing & Urban Development, et al., Appellees. No. 75-2758.

Filed: Feb. 24, 1977.

Appeal from the United States District Court for the Central District of California.

Before: MERRILL, ELY, and CHOY, Circuit Judges.

Miller brought this civil rights action in 1971, alleging that her dismissal as an employee of the Housing Authority of the City of Los Angeles in 1965 was based on her race, sex, and religion. The District Court originally granted summary judgment for the defendants on several grounds. That judgment was reversed by our court in a memorandum decision. On remand the defendants filed another motion for summary judgment, insisting that the suit was barred by the statute of limitations. That motion was granted, and Miller again appeals.

The only issue here presented is whether the District Court erred as a matter of law in granting the motion for summary judgment. We hold that it did not. The applicable statute of limitations is a California statute, prescribing a three-year period for statutory actions. CAL. CIV. PRO. CODE 338(1) (West 1954). *See*

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*George W. Romney, one of the original appellees, was the Secretary of the Department of Housing and Urban Development at the time of the institution of the suit. The present Secretary is Patricia Roberts Harris and, pursuant to Rule 43(c), Fed. R. App. P., she, in her official capacity, is substituted for former Secretary Romney as an appellee.

Smith v. Cremins, 308 F.2d 187 (9th Cir. 1962). Since Miller's cause of action accrued in 1966, her complaint revealed on its face that her claim was barred unless she could demonstrate some basis for tolling the statute.

Miller first argues that the statute never began to run in the first place because she was unable to exhaust her administrative remedies. The illogical import of this argument is that if we should hold her claim not to have ripened because of failure to exhaust administrative remedies, we would be forced to dismiss her action. Manifestly, the Government may not deny a litigant access to the courts by the simple expedient of denying to the claimant all rightful accesses to appropriate administrative remedies. Therefore, when it became obvious that the Government would accord Miller no further administrative relief, she was obliged to file her lawsuit without delaying for a period of an additional five years.

Miller next contends that the Government is estopped to assert the statute of limitations because it knowingly misled her in respect to her alleged right to relief. The short answer to this argument is that the record abundantly indicates that Miller never relied upon the statements claimed to have been made by government representatives. Rather, she continually pressed for an informal answer to her grievance. *See United States v. Lazy FC Ranch*, 481 F.2d 985 (9th Cir. 1973).

AFFIRMED.

APPENDIX II.

Order.

United States Court of Appeals, for the Ninth Circuit.

Alice Miller, Appellant, v. Patricia Roberts Harris, Secretary, Department of Housing & Urban Development, et al., Appellees. No. 75-2758.

Filed: Sept. 2, 1977.

Before: MERRILL, ELY, and CHOY, Circuit Judges.

The panel as constituted in the subject case (Merrill, Ely, and Choy) has unanimously voted to deny the Petition for Rehearing. Judges Ely and Choy have voted to reject the suggestion for an en banc rehearing, and Judge Merrill has recommended that the suggestion be rejected.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The Petition for Rehearing is denied, and the suggestion for a rehearing en banc is rejected.

APPENDIX III.

Memorandum.

United States Court of Appeals, for the Ninth Circuit.

Alice Miller, Plaintiff-Appellant, vs. George W. Romney, Secretary, Department of Housing & Urban Development; Walter A. Simon, in his official capacity as HUD in Possession Housing Authority of the City of Los Angeles; Robert F. Johnson, Officer, Department of Housing & Urban Development; Housing Authority of the City of Los Angeles, Department of Housing & Urban Development, Defendants-Appellees. No. 73-2686.

[March 17, 1975].

Appeal from the United States District Court for the Central District of California.

Before, VAN OOSTERHOUT,* BARNES, and HUFSTEDLER, Circuit Judges.

Plaintiff appeals from a decision of the district court alternatively (1) dismissing her civil rights action for failure to state a claim for relief and for lack of jurisdiction and (2) granting summary judgment for defendants. We reverse.

In February 1963, plaintiff was hired by the Housing Authority of the City of Los Angeles ["HACLA"] as a stenographic-secretary. In April 1963, pending the resolution of financial difficulties, HACLA was placed in possession of the Public Housing Administration, a federal agency, which subsequently became the Department of Housing and Urban Development ["HUD"]. Two years later, in June 1965, plaintiff

*Honorable Martin D. Van Oosterhout, Senior Judge, Eighth Circuit, sitting by designation.

was fired by her supervisor, Jesse Spray; the reasons given for her dismissal were "[i]nsubordination, inattention or dereliction of duty, discourteous treatment of fellow employees, unwillingness to cooperate in the overall operations of the office, and evident discontent with work assignment." In an affidavit before the district court, plaintiff claims that Spray told her, on June 16, 1965, that he discharged her because he had been hurt by her alleged statement, reported to him by another HACLA employee, that Spray was anti-semitic.

Pursuant to HACLA personnel regulations, plaintiff sought to appeal her discharge to the Acting Executive Director of HACLA, Robert Johnson, an employee of HUD. Johnson disclaimed authority to review her dismissal on the ground that he was merely the *Acting* Executive Director. Eventually plaintiff was permitted to take her appeal to the Board of Commissions of HACLA, who upheld her firing.

In September 1966, plaintiff sued HACLA in the Superior Court of the County of Los Angeles. Apparently she sought reinstatement and the opportunity to appeal her discharge in strict accord with the procedure provided by HACLA personnel regulations. The Superior Court ruled against her, and she ultimately abandoned her appeal from that ruling. On January 20, 1971, she commenced the instant action.

Plaintiff's *pro se* complaint is confusing, but we discern at least four possible claims for relief. Plaintiff contends that (1) Spray fired her because she is Jewish, female, and white; (2) Johnson and the Board of Commissioners of HACLA deprived her of her full right of appeal, as set out in the relevant personnel

regulations, because she is Jewish, female, and white; (3) the hearing conducted by the Board of Commissioners was unfair and discriminated against her as a white female Jew; and (4) various members of HACLA and HUD conspired to deny her the equal protection of the laws. She asks for damages based on lost earnings and suffering and seeks restoration of her right of appeal.

The district court, apparently misled by her inartfully drawn complaint, concluded that she failed to state any claim for relief and that the court lacked jurisdiction over the cause. Plaintiff's first, second, and third complaints are cognizable under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3); her fourth claim is cognizable under 42 U.S.C. § 1985(3) and 28 U.S.C. § 1343(1), (2). Plausibly, Spray (an employee of HACLA) and the Board of Commissioners of HACLA —and possibly even HUD employee Johnson, as Acting Executive Director of HACLA—were acting under color of state law. Plaintiff's claims, to the extent they involve alleged discrimination based on race may also be cognizable under 42 U.S.C. § 1981 and 28 U.S.C. § 1343(3). (*Cf. Bowers v. Campbell* (9th Cir. 1974) ..... F.2d .....)

Alternatively, the district court granted summary judgment for defendants on several issues. First, the court held that plaintiff's claims were barred by laches. The doctrine of laches is inapplicable. The statute of limitations, not laches, governs the period during which an action for legal and equitable relief may be maintained under the Civil Rights Acts. (*E.g., Mizell v. North Broward Hospital District* (5th Cir. 1970), 427 F.2d 468, 469; *Madison v. Wood* (6th Cir. 1969),

410 F.2d 564, 567; *Swan v. Board of Education of City of New York* (2d Cir. 1963); 319 F.2d 56, 59-60 & n.5; *cf. Morgan v. Koch* (7th Cir. 1969), 419 F.2d 993, 996; *Donovan v. Reinbold* (9th Cir. 1970), 433 F.2d 738; *Smith v. Cremins* (9th Cir. 1962), 308 F.2d 187.) The statute of limitations question was not presented below; accordingly, we do not reach it.

Second, the court ruled that plaintiff's claims were foreclosed by the doctrines of bar and collateral estoppel. Bar is inapplicable because the requisite identity of parties is lacking. As far as we can ascertain, the record before the district court did not contain the record of the state court action. In this situation, neither the district court nor we can decide whether any issue actually litigated and necessarily decided in the state case is dispositive of any controlling issue in plaintiff's civil rights action.

Third, the district court concluded that there is no genuine issue as to any material fact. The "affidavits" filed in support of the summary judgment motion manifestly violated Rule 56(e), Federal Rules of Civil Procedure. (*United States v. Dibble* (9th Cir. 1970) 429 F.2d 598.) But even if we could overlook these deficiencies, they did not meet the material factual issues and could not dissipate them.

Reversed and remanded for further proceedings consistent with the views herein expressed.

APPENDIX IV.

Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

Alice Miller, Plaintiff, vs. George W. Romney, Secretary, Department of Housing and Urban Development, et al., Defendants. Civil No. 71-2981-CC.

Filed: July 11, 1975.

The Court makes its Findings of Fact and Conclusions of Law as follows:

Findings of Fact

1. In February 1963, plaintiff was hired by the Housing Authority of the City of Los Angeles ["HACLA"] as a stenographic-secretary. In April 1963, pending the resolution of financial difficulties, HACLA was placed in possession of the Public Housing Administration, a federal agency, which subsequently became the Department of Housing and Urban Development [HUD]. Two years later, on June 8, 1965, plaintiff was discharged by her supervisor, Jesse Spray; the reasons given for her dismissal were "[i]nsubordination, inattention or dereliction of duty, discourteous treatment of fellow employees, unwillingness to cooperate in the overall operations of the office, and evident discontent with work assignment." Plaintiff claims that Spray told her, on June 16, 1965, that he discharged her because he had been hurt by her alleged statement, reported to him by another HACLA employee, that Spray was anti-semitic.

2. Pursuant to HACLA personnel regulations, plaintiff sought to appeal her discharge to the Acting Executive Director of HACLA, Robert Johnson, an

employee of HUD. Johnson disclaimed authority to review her dismissal on the ground that he was merely the Acting Executive Director. Eventually plaintiff was permitted to take her appeal to the Board of Commissioners of HACLA, who upheld her firing on August 9, 1966.

3. On September 7, 1966, plaintiff sued HACLA in the Superior Court of the County of Los Angeles. She sought reinstatement and to recover damages for loss of wages for her wrongful discharge. The Superior Court ruled against her, and on June 29, 1967, she abandoned her appeal from that ruling. On January 20, 1971, she commenced the instant action.

4. Plaintiff's complaint states four possible claims for relief. Plaintiff contends that (1) Spray fired her because she is Jewish, female, and white; (2) Johnson and the Board of Commissioners of HACLA deprived her of her full right of appeal, as set out in the relevant personnel regulations, because she is Jewish, female, and white; (3) the hearing conducted by the Board of Commissioners was unfair and discriminated against her as a white female Jew; and (4) various members of HACLA and HUD conspired to deny her the equal protection of the laws. She asks for damages based on lost earnings and suffering and seeks restoration of her right of appeal.

Conclusions of Law

1. This Court has jurisdiction of plaintiff's first, second and third claims as identified in the Findings of Fact at paragraph 4, pursuant to 42 U. S. C. §1983 and 28 U. S. C. §1343(3). This Court has jurisdiction of plaintiff's fourth claim for relief, as

identified in the Findings of Fact at paragraph 4, pursuant to 42 U. S. C. §1985(3) and 28 U. S. C. §1343(1).

2. The statute of limitations governs the period during which an action for legal and equitable relief may be maintained under the Civil Rights Act.

3. Since the Civil Rights Act contains no statute of limitations, the applicable period of limitation is to be found in the statutes of limitation of California —the state in which this action arose.

4. The applicable statute of limitation is Section 338(1) of the California Code of Civil Procedure, which provides that actions upon a liability created by statute must be brought within three years after the cause of action shall have accrued.

5. Plaintiff's claims for relief accrued when she was discharged from her employment on June 8, 1965, or sometime prior to the filing of her Superior Court action on September 7, 1966.

6. Plaintiff's complaint is therefore barred by the statute of limitations in Section 338(1) of the California Code of Civil Procedure.

7. Even if plaintiff's claims for relief did not accrue until she abandoned her appeal on June 29, 1967, from the Superior Court ruling, her complaint would still be barred by the statute of limitations in Section 338(1) of the California Code of Civil Procedure.

~~8. There is no genuine issue as to any material fact and the defendants Romney, Simon and Johnson are entitled to have summary judgment entered in their favor.~~

DATED: This 11th day of July, 1975.

/s/ Charles H. Carr
UNITED STATES DISTRICT JUDGE

APPENDIX V.

Code of Civil Procedure § 338(1).

§ *338. Three years; statutory liability, exception; trespass or injury to realty; taking, detaining or injuring goods or chattels; fraud or mistake; bond of public official; notary public, additional time, maximum limit; slander of title; false advertising*

Within three years:

1. An action upon a liability created by statute, other than a penalty or forfeiture.

* * *

(Amended by Stats. 1972, C. 823, p. 1469, § 2.)

APPENDIX VI.

Rule 56. Summary Judgment.

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. As amended Dec. 27, 1946, effective March 19, 1948.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence

before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the

court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.